80996-8

NO.249816

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

AMBER L. KAPPELMAN,

Plaintiff/Appellant

v.

THEODORE J. LUTZ,

Defendant/Respondent

OPENING BRIEF OF APPELLANT

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Assignments of Error

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2. The trial court erred by giving Mr. Lutz's requested 'emergency' jury instruction that told the jury it could not second-guess Mr. Lutz's decisions before impact because he caused the emergency by his own negligence in speeding, by driving with a passenger and by driving during an hour of darkness.

3. The trial court erred in allowing evidence of a prior statement by Ms. Kappelman without allowing her to explain that the statement was solicited by and made to Mr. Lutz's insurance adjuster.

4. The trial court erred in excluding evidence of the acceleration capability of Mr. Lutz's motorcycle.

Issues Pertaining to Assignments of Error

No. 1: May a passenger injured in a motorcycle accident show the motorcycle driver was driving in violation of his motorcycle learner's permit by driving with a passenger and during an 'hour of darkness'?

No. 2: Is a motorcycle permittee who violates his permit by speeding, carrying a passenger and driving during an hour of darkness entitled to an 'emergency' jury instruction when his own negligence caused the emergency he faced?

No. 3: Is an injured plaintiff who is confronted at trial with a prior statement entitled, on cross-examination, to explain that Mr. Lutz's insurance adjuster solicited the statement from the injured plaintiff when she was still heavily medicated and in pain to show the adjusters's interest and bias in soliciting a statement from an injured plaintiff in that state of health?

No.4: Is a party entitled to show the acceleration capability of a motorcycle when an issue at trial is whether the motorcycle accelerated to a certain speed in the short distance between the city limits and an accident scene?

B. STATEMENT OF THE CASE

1. Statement of Facts

Plaintiff-Appellant Amber Kappelman resides in Lyle, Washington. By the time of trial, Amber Kappelman was married and her name was Amber Strain. She attended Columbia High School in White Salmon, graduating in June, 2000. RP 56. In June of 2000, Ms. Kappelman was 18 years old. RP 59. She had never ridden on a motorcycle before June 19, 2000. RP 59. On that day, Ms. Kappelman and a friend, Amber Smith, met to go to a drive-in movie. Amber Smith was driving. On the way, Ms. Smith decided to stop by the house of a friend, Will Altig. RP 59. Mr. Altig lived near Husum. When Ms. Kappelman and Amber Smith arrived, it was not quite 10:00 in the evening, and it was dark. RP 60. Mr. Altig had just purchased a new motorcycle, and Mr. Altig asked Ms. Smith to go for a ride. Defendant-Respondent Mr. Lutz, also a resident of Husum, who was visiting Mr. Altig, had also purchased a new high-performance motorcycle (a Yamaha 600) approximately three months before. Mr. Lutz was 21 at the time. RP 184-185. The Yamaha was Mr. Lutz's first street bike; he had never owned one before, although he had ridden on dirt bikes. RP 186. As of June 19, 2000, Mr. Lutz had not satisfied the requirements for a full motorcycle

endorsement for his driver's license, including passing the requisite skill test. As a result, Washington law (RCW 46.20.510, Appendix 3, pp. 1-2, hereinafter "APP") prohibited him from carrying passengers **at any time**, and prohibited him from operating after dark. *See*, traffic citation attached to Defendant's First Motion *in Limine*, CP 9, APP-1, and Police Traffic Collision Report, APP-2, identified as plaintiff's Exhibit 1. Mr. Lutz was later cited by the Washington State Patrol for operating the motorcycle in violation of state law and his permit. Traffic Citation, APP-1.

Mr. Altig suggested Ms. Kappelman go for a motorcycle ride with Mr. Lutz. RP 60. Someone at his house gave Ms. Kappelman a helmet, which she put on. Ms. Kappelman was wearing jeans, a tank top and a zip-up sweatshirt and sandals. Ms. Kappelman told Mr. Lutz, before she climbed on the motorcycle, that she had never been on a motorcycle before. RP 61. Mr. Lutz drove his motorcycle north on 141 through Husum at 45 miles per hour. When he reached the city limits on the north side of town, Mr. Lutz began to accelerate rapidly, in spite of the fact that there is a 55-mile-per-hour speed limit sign at the city limits. RP 72. Mr. Lutz admitted that he knew there were deer in the area, and he also knew that the deer come out at night to feed. RP 192. As he accelerated, Ms. Kappelman felt like she was being

"sucked off" the back of the motorcycle, and yelled at Mr. Lutz to "slow down." After accelerating to a high rate of speed, Mr. Lutz suddenly let off the accelerator. In response to the decrease in acceleration, Ms. Kappelman looked up and saw a deer in the road about 250-300 feet ahead, walking slowly from the left side of the road to the right side. Even though it was dark, Ms. Kappelman could see the deer clearly in the headlight. Mr. Lutz did not brake; rather, it appeared to Ms. Kappelman that he was trying to avoid the deer by steering towards the right shoulder of the road. In essence, it appeared that Mr. Lutz was attempting to beat the deer to the right shoulder. Indeed, Ms. Kappelman never felt Mr. Lutz brake at all. Within seconds after she looked up and saw the deer, the motorcycle hit the deer, and Ms. Kappelman flew off the motorcycle over Mr. Lutz, and slid 200 feet down the highway. RP 72, 73, 75-81, 126-128.

Mr. Lutz admitted that he was able to see the deer clearly. RP 193. Mr. Lutz also admitted that he tried to avoid hitting the deer by steering around it on the right shoulder. RP 193. Mr. Lutz testified that he was approximately 200 feet from the deer when he saw it, and that only when he realized he could not avoid the deer (by going around it), he finally stood on the brakes with full force the instant before he hit the deer, lost control and

went into a skid. RP 194-196. Skid marks at the scene of the accident established that Mr. Lutz tried to go around the deer by steering to the right shoulder. RP 202-204. The motorcycle struck the deer in the head; in other words, the motorcycle collided with the part of the deer's body which was farthest to Mr. Lutz's right. RP 214. Mr. Lutz admitted that he was exceeding the speed limit, both to the state trooper that evening and on the stand at trial. RP 204. Mr. Lutz testified that from the time he saw the deer until impact, 3-4 seconds elapsed. RP 220-221. Mr. Lutz had time to downshift two gears, but he did not apply the brakes with full force until he was 40 feet from the deer. RP 221-222.

Ms. Kappelman estimated that the motorcycle was traveling 80-90 miles per hour before Mr. Lutz let off the accelerator. RP 72. Ms. Kappelman estimated that when the motorcycle hit the deer, it was still traveling at 70 miles an hour. RP 80. The deer was killed from the force of the collision. Mr. Lutz rode the motorcycle down the highway another 40 feet, and then Mr. Lutz and the motorcycle went over, and the motorcycle slid down the highway without a rider, and came to rest 369 feet from the point of impact. RP 82, 148-149, 157-158. Mr. Lutz also slid down the highway and came to rest approximately 180 feet from the deer. RP 214, 227-228.

Ms. Kappelman was badly injured in the accident. The friction from the pavement ripped the skin off her right arm and shoulder so that she could see bone, ripped the skin off her kneecap, and she had road rash on other parts of her body. She was afraid initially she would not be able to walk again. She was in shock and extreme pain. RP 83. Mr. Lutz also broke his ankle and suffered road rash. RP 214. An ambulance took Ms. Kappelman to the hospital, where she remained for two days, heavily medicated. RP 84, 97. After Ms. Kappelman was released from the hospital, she went home, but could not walk for a couple of weeks, and her knee remained stiff for several months. Ms. Kappelman still suffers pain, including stinging pains in the scars on her shoulder, especially when the scars are exposed to the sun. RP 100-101. Ms. Kappelman presented the videotaped testimony of her treating physicians, Drs. Hindahl and Blackburn, concerning her injuries and medical costs. RP 341, 353.

Ms. Kappelman lost wages while she was off work recuperating at home, and incurred medical expenses of $7,300. Since she had no medical insurance, her medical bills remain unpaid. RP 99, 105-106. Ms. Kappelman will need surgery to address the scars and reduce the pain. She

will incur another $5,000 to $10,000 in medical expenses to have the required procedures surgical procedures. RP 103, 341, 353.

At trial, Ms. Kappelman called Trooper Cashatt, the Washington State Patrol officer who arrived at the scene and investigated the accident. He filed the official accident report. Police Traffic Collision Report, identified as Exhibit 1. APP-2. Trooper Cashatt testified at trial that in his report, he confirmed that the motorcycle hit the deer at the end of a 41-foot skid mark, and that the motorcycle came to rest 369 feet from the deer. RP 148-149, 157-158. Trooper Cashatt testified that his report noted the motorcycle slid without a rider for 330 feet. RP 158, 161. Trooper Cashatt also interviewed Mr. Lutz. Mr. Lutz admitted that he accelerated to 65 miles an hour (ten miles over the speed limit) as he left the Husum city limits and that he saw the deer but was unable to avoid hitting it. Mr. Lutz admitted to Trooper Cashatt that he was still traveling at 60 when the motorcycle collided with the deer. RP 168-170. Ms. Kappelman's position at trial was that Mr. Lutz substantially underestimated his speed when Trooper Cashatt spoke to him. Even so, Mr. Lutz did acknowledge to Trooper Cashatt that he was speeding.

Ms. Kappelman called the only expert who testified at the trial, an accident reconstructionist named Robert Stearns. RP 235-237. Mr. Stearns

testified that Mr. Lutz's motorcycle, the Yamaha 600, had a maximum speed of 140 miles an hour. RP 239. Based on his analysis of the evidence at the scene of the accident, Mr. Stearns estimated that when Mr. Lutz spotted the deer, he was traveling at between 80-85 miles an hour. RP 303. Mr. Stearns further testified that Mr. Lutz was traveling 70-77 miles an hour before he began braking 40 feet from the deer, and that he was still traveling at 63-68 miles an hour at impact. RP 245-247. These were **conservative** estimates. As Mr. Stearns explained, accident reconstruction is a process of determining how much energy is lost during the course of an accident in order to determine the speed of the vehicle before impact. But, while accident reconstruction can determine, based on available physical evidence such as a skid mark, how much energy is lost, reconstruction cannot always account for all energy lost during the course of an accident. For example, Mr. Stearns did not know how much energy was lost when Mr. Lutz's motorcycle hit the deer, nor did he know how much energy was lost between the time that Mr. Lutz backed off the accelerator and the time he began braking full force 40 feet from the deer. As a result, a reconstructionist's estimates of speed are conservative (low) and tend to underestimate the actual speed of the vehicle at any given point before it comes to a stop. In this case, Mr. Stearns testified

that Mr. Lutz's speed when he saw the deer was likely higher than his estimates. RP 237-244.

Mr. Stearns' opinion was supported by other evidence. If Mr. Lutz was 250 feet from the deer when he saw it as Ms. Kappelman testified, Mr. Lutz would have been able to brake and come to a complete stop before hitting the deer if he had been traveling at the speed limit of 55 or even 60 miles per hour when he saw the deer. If Mr. Lutz was 300 feet from the deer when he saw it, he could have come to a complete stop even if he had been traveling at 65 miles per hour. RP 257-263. Alternatively, Mr. Lutz testified that three to four seconds elapsed before impact after he saw the deer. Mr. Stearns testified that Mr. Lutz could have come to a complete stop in three seconds if he had been traveling at 60 miles per hour when he saw the deer, and could have come to a complete stop in four seconds even if he had been traveling at 65 miles an hour. RP 270-278. Since he could not come to a complete stop and indeed was still traveling at over 60 miles an hour when he hit the deer, the strong inference was that Mr. Lutz was either traveling well in excess of 65 miles per hour when he saw the deer, which would have been particularly negligent in light of his inexperience, the light conditions (night), and the fact that he was carrying a passenger, or he was negligent in

failing to brake sooner. As will be further discussed below, Mr. Lutz was not supposed to be operating his motorcycle at night, and he was not supposed to be carrying a passenger at any time, day or night. Trooper Cashatt cited him for doing so. *See,* Traffic Citation attached to Defendant's First Motion *in Limine*, CP 9. APP-1.

2. Procedural History

This is a personal injury action. Ms. Kappelman was injured while riding as a passenger on Mr. Lutz's motorcycle, driven by Mr. Lutz. The accident occurred when the motorcycle, according to Ms. Kappelman's allegation, driven at excessive speed, hit a deer. The accident occurred 50 minutes after sunset, during a statutory hour of darkness. Mr. Lutz at the time did not have a full motorcycle endorsement. His permit prohibited him from carrying a passenger at any time, day or night, and from operating the motorcycle at night.

Ms. Kappelman filed her complaint in Klickitat County Superior Court in June 2003. CP 1-3. Mr. Lutz filed his Answer in September 2003. CP 4-6. Prior to trial, Mr. Lutz filed Defendant's First Motion *in Limine*, and requested that the court exclude any evidence of the fact that he was operating his motorcycle in violation of law (RCW 46.20.510, APP-3, p. 2)

by operating at night and carrying a passenger before he had his full endorsement, that he was cited for doing so, that he pleaded guilty, and was convicted. CP 7-9. Ms. Kappelman argued that the evidence should come in. Plaintiff's Memorandum in Response to Defendant's First Motion *in Limine*, CP 18-23. Over Ms. Kappelman's objection, the trial court allowed the motion. Order Granting Defendant's First Motion *in Limine*, CP 16-17. At the commencement of trial, Ms. Kappelman requested that the trial court reconsider its ruling on Defendant's First Motion *in Limine*. Memorandum in Support of Motion for Reconsideration, CP 24-29. The trial court refused. RP 10-11. Ms. Kappelman excepted to the trial court's ruling. RP 11, 360.

The case was tried to a jury for three days beginning December 21, 2005, before the Honorable E. Thompson Reynolds. The jury returned a special verdict for Mr. Lutz on December 23, 2005, and the court entered judgment on February 7, 2006, for Mr. Lutz. Special Verdict, CP 64-67. Judgment, CP 74-75. In response to a question posed by the court, the jury said that Mr. Lutz was not negligent. Special Verdict, CP 64-67. Ms. Kappelman filed her notice of appeal on March 2, 2006. Notice of Appeal, CP 76-80.

C. SUMMARY OF ARGUMENT

First, the trial court erred in excluding all evidence relating to Mr. Lutz's violation of his motorcycle learner's permit by carrying a passenger and by driving during an hour of darkness, including the statute, the traffic citation Mr. Lutz received and his guilty plea. The statutory permit scheme is meant to allow persons learning to operate a motorcycle to operate one in limited circumstances before taking an on-road skills test that emphasizes collision avoidance. So long as there is a jury question of a causal link between the statutory violation and the accident, evidence of violation of a statute, and the statute itself, is admissible. Ms. Kappelman might have been entitled to a trial court ruling that Mr. Lutz was negligent as a matter of law, and she was at least entitled to a jury instruction that the statute established a standard of care beyond the duty to exercise ordinary care and that evidence of violation of the statute is evidence of negligence.

Second, the trial court erred by giving an 'emergency' jury instruction that instructed the jury it could not second-guess Mr. Lutz's reaction to the emergency he faced because Mr. Lutz caused the emergency by his own negligence in speeding, in driving with a passenger, and by driving during an 'hour of darkness.' The emergency instruction cannot be given where a party

invoking the 'emergency doctrine' in whole or in part created the emergency by his own negligence. Mr. Lutz was negligent because, as he admitted, he sped. He was also negligent because he violated the terms of his motorcycle learner's permit by carrying a passenger and driving during an 'hour of darkness.' A full motorcycle endorsement is only given to a driver who passes an on-road skills test, which emphasizes collision avoidance skills. It was for the jury to decide whether there was a causal link between either of those violations and the accident.

Third, the trial court erred in allowing evidence of a prior statement by Ms. Kappelman, but then prohibiting her from explaining that the statement was solicited by and made to Mr. Lutz's insurance adjuster. Once Mr. Lutz's attorney 'opened the door' by asking about the statement, Ms. Kappelman was entitled to show the circumstances of the statement given when she was in pain and heavily medicated from the accident, including the interest and bias of the person who solicited and took the statement.

Fourth, the trial court erred in excluding evidence of the acceleration capability of Mr. Lutz's motorcycle. This evidence was directly relevant to resolving a dispute in the testimony of Mr. Lutz, on the one hand, and Ms.

Kappelman and her expert, Mr. Robert Stearns, on the other hand, on the question of Mr. Lutz's speed when he first saw the deer.

D. ARGUMENT

1. The Trial Court Erred in Excluding Evidence That Mr. Lutz Was Driving in Violation of His Motorcycle Learner's Permit By Driving with a Passenger and During an 'Hour of Darkness', Evidence of the Traffic Citation Issued Mr. Lutz for That Violation, Mr. Lutz's Guilty Plea to the Traffic Citation, And any Reference to the Statute He Violated

(a) Standard of Review

The trial court's ruling on Defendant's First Motion *in Limine* is erroneous if the trial court applied the wrong legal standard. Admission of evidence is generally a matter of discretion, but that discretion is abused, requiring reversal, where the "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." Goodwin v. Bacon, 127 Wn.2d 50, 54, 896 P.2d 673, 676 (1995). A trial court's decision is based on 'untenable reasons' if it was reached by applying the wrong legal standard. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-424, 138 P.3d 1053 (2006). An erroneous ruling on evidence is grounds for reversal if it results in prejudice. An evidentiary error is considered prejudicial if, within reasonable probability, the outcome of the trial would have been materially

affected had the error not occurred. State v. Halstein, 122 Wn2d 109, 125-26, 857 P.2d 270 (1993).

(b) Argument

The trial court granted Defendant's First Motion *in Limine* to exclude evidence that Mr. Lutz operated his motorcycle at the time of the accident in violation of his motorcycle permit by carrying a passenger and by operating his motorcycle during an hour of darkness.[1] The court also excluded the traffic citation Mr. Lutz received for violating his motorcycle permit and guilty plea and conviction. Order, CP 16-17. The court would not permit Ms. Kappelman to argue that Mr. Lutz's violation of the statute was evidence of negligence. See Court's Ruling in Transcript of Hearing on September 20, 2005, on Defendant's First Motion *in Limine*, RP of September 20, 2005, 14-16. (The hearing on the Defendant's First Motion *in Limine* was transcribed separately from the trial).

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[1] "Hours of darkness" mean the hours from one-half hour after sunset to one-half hour before sunrise. RCW 46.04.200. See, APP-3, p. 1. The subject accident occurred about 50 minutes after sunset, within the "hours of darkness" of RCW 46.04.200. Transcript of Hearing on September 20, 2005, on Defendant's First Motion *in Limine*, RP 2.

RCW 46.20.500(1) requires a person to have a motorcycle endorsement to operate a motorcycle. See, APP-3, p. 1. The subject motorcycle was Mr. Lutz's first experience with an on-road motorcycle and he held a 90-day "motorcycle instruction permit" under RCW 46.20.510, APP-3, p. 2. Traffic Citation, CP 9, APP-1. Transcript of Hearing on September 20, 2005, on Defendant's First Motion *in Limine*, RP 1. The permit allows a person who wishes to learn to ride a motorcycle to operate a motorcycle for 90 days, but without passengers and not "during the hours of darkness," before taking the driving test required for a full motorcycle endorsement. RCW 46.20.510(1),(2), APP-3, p. 2. The driving test for a motorcycle endorsement "emphasizes maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision." RCW 46.20.515, APP-3, p. 2.[2]

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[2] The department of licensing may waive the examination requirement for those "who satisfactorily complete the voluntary motorcycle operator training and education program authorized under RCW 46.20.520 [APP-3, p. 3], or who satisfactorily complete a private motorcycle skills education course that has been certified by the department under RCW 46.81A.020. [See, APP-3, p. 4-5]." RCW 46.20.515, APP-3, p. 2. RCW 46.20.520 establishes a "motorcycle safety education advisory board to assist the director of licensing in the development of a motorcycle operator training education program" that emphasizes driver safety. The main purpose of the program is to promote safety. RCW 46.20.520(3). The main purpose of RCW 46.81A.020, which is also referenced in RCW 46.20.520, is to promote "safety awareness". See, RCW 46.81A.001. APP-3, p. 4.

Washington, as of 1986, no longer applies negligence *per se* for violation of a statutory standard. RCW 5.40.050. But it does allow violations "as evidence of negligence." RCW 5.40.050. Pettit v. Dwoskin, 116 Wn.App.466, 472, 68 P.3d 1088 (Div.1 2003), rev. den., 151 Wn.2d 1011 (2004). Such evidence is admissible and establishes a duty of care beyond the duty to exercise ordinary care when the statute (1) protects a class of persons that includes the person whose interest is invaded; (2) protects the particular interest invaded; (3) protects that interest against the kind of harm that resulted; and (4) protects that interest against the particular hazard from which the harm resulted. Mathis v. Ammons, 84 Wn.App. 411, 416, 928 P.2d 431 (Div. 2 1996), rev. den., 132 Wn.2d 1008, 940 P.2d. 653 (1997). This is the test set forth in Restatement (Second) of Torts § 286 (1965), and it has been part of Washington law for over 30 years. Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 269-270, 96 P 3d 386 (2002). The first prong of the Restatement test is met if a purpose of the statute in whole or **in part** is to protect a class of persons of which plaintiff is a member. Bayne v. Todd Shipyards Corp., 88 Wn.2d 917, 919, 568 P.2d 771 (1977).

Here, that test is easily met. The statute goes beyond requiring the exercise of ordinary care specifically to forbid a permittee to carry a passenger or drive during an hour of darkness. It is meant to protect

passengers such as Ms. Kappelman from the hazards of riding with a motorcycle permittee, as well as permittees from harming themselves and members of the public on the roadway. See, Nesmith v. Bowden, 17 Wn. App 602, 563 P2d 1322 (Div. 3 1977) (first prong of Restatement test satisfied by regulation that seeks to protect traveling public).

The permit program of RCW 46.20.510, APP-3, p.2, allows a permittee to gain experience operating a motorcycle before taking the driving test specified in RCW 46.20.515, APP-3, p. 2. As noted, the test emphasizes braking and turning to avoid a collision, the very thing that happened here. The legislative scheme bespeaks a concern for the safety of passengers, permittees, and the traveling public by banning passengers and driving during an hour of darkness until an exam that emphasizes braking and turning to avoid a collision is passed.

Ms. Kappelman's Complaint alleged that Mr. Lutz was negligent in speeding, failing to keep a proper lookout, and otherwise failing to operate his motorcycle in a safe and reasonable manner. Complaint, par. 4, CP 1-2. The permit violation issue came to the fore in discovery, and would have been used at trial except for Defendant's First Motion *in Limine*, filed in September 2005, three and one-half months before trial. Evidence of the

permit restrictions and violations was relevant to establish a statutory duty beyond the duty of ordinary care.

The trial court should have permitted Ms. Kappelman to introduce evidence of the statutory violation and Ms. Kappelman should have been entitled to a jury instruction that the statute establishes a duty of care and evidence of violation is evidence of negligence. Pettit v. Dwoskin, 116 Wn.App. at 468. And, if Mr. Lutz had failed to adduce any contrary evidence, the court should have ruled that, as a matter of law, no reasonable person could find that Mr. Lutz exercised due care and negligence is established. Pudmaroff v. Allen, 138 Wn.2d 55, 67- 68, 977 P.2d 574 (1999).

Mr. Lutz's main objection to admission of this evidence was lack of relevance under ER 401. Defendant's Memorandum in Support of Defendant's First Motion *in Limine*, CP 10-15. But not only was this evidence relevant, it was **strongly** relevant. The entire motorcycle permitting system is designed to prevent motorcycle permittees from operating motorcycles in dangerous situations (at night and/or with passengers) until they have experience with a motorcycle and can pass an on-road examination that "emphasize[s] maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending

collision." RCW 46.20.515, APP-3, p. 2. The legislature obviously thought it important that to become a fully-licensed (and unrestricted) motorcycle operator one must show proficiency in emergency braking and turning to avoid a collision. This legislation not only protected motorcyclists and others on the road, but obviously specifically was meant to protect potential passengers such as Ms. Kappelman.

The case of Barrett v. Lucky Seven Saloon, Inc., 152 Wn. 2d 259, 96 P.3d 386 (2004) is instructive. The court there noted that the test for whether a statute states a duty of care beyond ordinary care is set forth in Restatement (Second) of Torts § 286 (1965), which has been part of Washington law for over 30 years. The court ruled under this test that RCW 66.44.200(1) established a standard of care for damages caused by intoxicated drivers in actions against the purveyor of the intoxicants. This is the same test used by the Mathis v. Ammons court, discussed above at p. 18.

As in Barrett v. Lucky Seven Saloon, Inc., the statute here was designed to prevent physical harm. In Barrett v. Lucky Seven Saloon, Inc., the potential harm the statute protected against was from intoxicated drivers. Here, the potential harm is from inexperienced motorcycle permittees. See also, Skeie v. Merecer Trucking Co., 115 Wn. App. 144, 148-49, 61 P.3d 1207 (Div. 3 2003) (RCW 46.61.655 establishes standard of care under

Restatement test for securing load on truck); Schneider v. Strifert, 77 Wn. App. 58, 61-62, 888 P.2d 1244 (Div. 3 1995) (animal control ordinance establishes standard of care under Restatement test in dog bite case).

Ms. Kappelman was entitled to use the statutory standard of care, and evidence of its violation. Its exclusion was prejudicial, requiring reversal, because it excluded all evidence of two ways Mr. Lutz was negligent. It also thereby denied Ms. Kappelman the chance to seek an instruction that RCW 46.20.510, APP-3, p. 2, established the applicable standard of care. If it had been admitted, the court might have then ruled that Mr. Lutz was negligent as a matter of law. At the least, it should have been admitted and an appropriate jury instruction given.

Mr. Lutz relied below on the case of Holz v. Burlington Northern Railroad Co., 58 Wn.App 704, 794 P2d 1304 (1990). Holz applies the general rule that licensure information is not admissible if there is no showing of causation between the lack of a license and the accident. Holz cited White v Peters, 52 Wn. 2d 824, 329 P.2d 471 (1958), a supreme court case that states the general rule that lack of licensure is admissible if there is a causal link between that lack of license and the accident. In White v Peters, White had had his right leg amputated and he had a restricted driving license requiring his car's throttle to be mounted on the steering wheel so he could exclusively

operate the brakes with his remaining leg. White got into an accident, and the car he drove was not specially equipped in compliance with his restricted license. There was an issue whether this affected his reaction time - because he had to move his foot from the gas pedal to the brake pedal. The court in White v. Peters said:

> An *unlicensed* motor vehicle operator may recover for his injury if, in other respects, he is exercising proper care (Weihs v. Watson, 32 Wn. (2d) 625, 203 P. (2d) 350 (1949), because . . .
>
> > "The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the state and been in possession of the statutory license." Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181 (1914).
>
> But such is not the instant case. Plaintiff White's noncompliance with the requirements of his restricted driver's license may or may not have been a factor contributing to the accident. Whether his noncompliance is a proximate cause of the accident is a jury question in the circumstances of this case. White v Peters, 52 Wn. 2d 824, 828, 329 P.2d 471 (1958).

Here, there was ample evidence that Mr. Lutz's permit violation played a role in the subject accident. Mr. Lutz drove his motorcycle in violation of the terms of his learner's permit by carrying a passenger and driving at night. By his own admission, he was speeding. The legislature

determined in the enactment of the motorcycle permit scheme, that an inexperienced motorcycle operator such as Mr. Lutz generally lacks sufficient collision avoidance skills to avoid an impending collision, and there was evidence that Mr. Lutz performed poorly in avoiding the subject accident. In this regard, this case is like the supreme court decision in White v Peters, 52 Wn. 2d 824, 329 P.2d 471 (1958) and unlike the decision of Division One of the appeals court in Holz.

Holz is also factually different from this case. Mr. Holz drove his motorcycle at night through an intersection across which Burlington Northern had parked a railroad tank car. When Burlington Northern attempted to introduce evidence that plaintiff Holz drove his motorcycle without a motorcycle endorsement, the court granted the plaintiff's motion to exclude the evidence. Speed was not an issue, unlike here. In Holz, the injured party was not the party trying to invoke the licensure statute, a fatal defect under Washington law. Indeed, the defendant railroad was trying to use the statute against the victim's survivors. Finally, in Holz there was no causal link between the statutory violation and the accident, also a fatal defect under Washington law for invoking the statutory violation.

Mr. Lutz turned the logic (and policy) behind the Holz decision on its head. In this case, Mr. Lutz was prohibited by the terms of his restricted endorsement from driving at night or carrying a passenger (at any time). He violated the terms of the endorsement. Mr. Lutz had **no business** subjecting an innocent passenger like Ms. Kappelman to the risk of injury until he had demonstrated that he was competent to operate the motorcycle.

Ms. Kappelman in this case was injured because Mr. Lutz violated the terms of his restricted endorsement. WPI 60.03 is a pattern instruction for use in this very situation. It states as follows:

> The violation, if any, of a [statute] [ordinance] [administrative rule] is not necessarily negligence, but may considered by you as evidence in determining negligence. Such a violation may be excused if it is due to some cause beyond the violator's control, and that ordinary care could not have guarded against.

RCW 5.40.050 provides in part:

> A breach of duty imposed by statute, ordinance, or administrative rule shall not be considered negligence *per se*, but may be considered by the trier of fact as evidence of negligence . . .

Washington follows the rule adopted by other courts that violation of a statute, ordinance, or administrative rule which is for the benefit or protection of the person injured, or addressed to the particular harm suffered, may be

considered as negligence. Bauman v. Crawford, 104 Wn.2d 241, 247 n.1, 704 P2d 1181 (1985). In the Holz case, the statute which plaintiff violated was not for the benefit of Burlington Northern. In this case, the statute is for the benefit of Ms. Kappelman.

2. The Trial Court Erred By Giving Mr. Lutz's Requested 'Emergency' Jury Instruction That Told the Jury It Could Not Second-Guess Mr. Lutz's Decisions in the Emergency He Faced Because He Caused the Emergency By His Own Negligence in Speeding, By Driving With a Passenger and by Driving During An Hour of Darkness, All in Violation of His Permit

(a) Standard of Review

The court should review *de novo* the trial court's decision to give an instruction based on a ruling of law. State v Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn. 2d 541, 544, 947 P.2d 700 (1997); Tuttle v. Allstate Ins. Co., 134 Wn. App.120, 131, 138 P.3d 1107 (Div.2 2006). An instruction that erroneously states applicable law is reversible where it prejudices a party. A clear misstatement of the law is presumed to be prejudicial. Thompson v. King Feed & Nutrition Service, Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

(b) Argument

The trial court, at Mr. Lutz's request and over Ms. Kappelman's objection, gave Washington Pattern Jury Instruction 12.02 on "Duty Of One Confronted By An Emergency." Counsel for Ms. Kappelman objected on the record at the commencement of trial to the instruction, even before jury selection. See, RP 9. Counsel then excepted to the instruction prior to the court's giving the instruction. RP 360-361. WPI No. 12.02 states:

> A person who is suddenly confronted by an emergency through no negligence of his own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

The court gave this instruction to the jury. RP 367-368.

The emergency instruction can not be given where the party invoking the 'emergency doctrine' (i.e., Mr. Lutz) **in whole or in part** created the emergency by his own negligence. Brown v. Spokane County Fire Protection Dist. No.1, 100 Wn.2d 188, 197, 668 P.2d 571 (1983); Bennett v. McCready, 57 Wn. 2d 317, 320, 356 P.2d 712 (1962); Sandberg v. Spoelstra, 46 Wn.2d 776, 782-83, 285 P.2d 564 (1955); Tuttle v. Allstate Ins. Co., 134 Wn.App.120, 130 - 31, 138 P.3d 1107 (Div. 2 2006).

Mr. Lutz created the emergency in this case in at least three ways. He operated his motorcycle at the time of the accident in violation of his permit in two respects: he operated his motorcycle with a passenger (Ms. Kappelman) and he operated it during an hour of darkness. As previously explained, Mr. Lutz at the time of the accident held a "motorcycle instruction permit" under RCW 46.20.510, APP-3, p. 2. The permit allows persons who wish to learn to ride a motorcycle to operate a motorcycle for 90 days but without passengers and not "during the hours of darkness" before taking the driving test required for a full motorcycle endorsement. RCW 46.20.510(1). Mr. Lutz was insufficiently experienced in collision avoidance to qualify for a full motorcycle endorsement, and was negligent therefore in carrying a passenger, and particularly at night. Importantly, the on-road motorcycle endorsement examination emphasizes "maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision." RCW 46.20.515, APP-3, p. 2. Mr. Lutz was only there (i.e., driving his motorcycle at the time of the accident) because he was violating motorcycle permit restrictions meant to improve the safety of the operator, would-be passengers and the public. It was negligent for him to operate his motorcycle with a passenger. It was negligent for him to operate his motorcycle during an 'hour of darkness.'

Mr. Lutz also created the emergency because he was speeding at the time of the accident. Mr. Lutz admitted he was traveling at least 65 mph although Ms. Kappelman expressly contended he was traveling faster.[3] In effect, the trial court told the jury to excuse Mr. Lutz's reaction to a situation he created by speeding.

The instruction by its own terms applies only if the defendant was in an emergency through no negligence of his own. If Mr. Lutz was in an emergency, it was because of at least three acts of his own negligence. The instruction was prejudicial because it misstated the law, and essentially told the jury to ignore Mr. Lutz's pre-emergency negligence. It should not have been given because Mr. Lutz by his own admission was negligent. It was error to give the instruction.

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[3] Mr. Lutz admitted he exceeded the posted speed limit. Ms. Kappelman testified he was traveling at 80-90 mph in an area with a posted speed limit of 55 mph. Plaintiff's expert testified that Mr. Lutz, after seeing the deer, decelerating and gearing down twice, was traveling at 70-77 mph when he first started braking, and 67 mph when he hit the deer after laying down only 40 feet of skid marks.

3. The Trial Court Erred in Allowing Evidence of a Prior Statement by Ms. Kappelman Without Allowing Her To Explain That The Statement Was Solicited By and Made To Mr. Lutz's Insurance Adjuster

(a) Standard of Review

A trial court's exclusion of evidence is reviewed for 'abuse of discretion'. That discretion is abused, requiring reversal, where the "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." Goodwin v. Bacon, 127 Wn.2d 50, 54, 896 P.2d 673, 676 (1995), quoting, Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Ms. Kappelman claims the trial court's decision was based on 'untenable reasons.' A trial court's decision is based on 'untenable reasons' if it was reached by applying the wrong legal standard. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-424, 138 P.3d 1053 (2006). Such error is reversible if it is prejudicial, and is considered prejudicial if, within probability, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstein, 122 Wn.2d 109, 125-126, 857 P2d 270 (1993).

(b) Argument

Mr. Lutz's attorney asked Ms. Kappelman on cross-examination if she made a "statement" five weeks after the accident in which she indicated she did not "blame" Mr. Lutz for the accident. RP 124-125. The trial court then refused to allow Ms. Kappelman to explain that Mr. Lutz's insurance adjuster solicited the statement from Ms. Kappelman while she was still suffering from the effects of the accident. RP 134-135. Alternatively, counsel for Ms. Kappelman requested that the trial court at least permit her to explain that the statement was solicited by a representative of Mr. Lutz, but the trial court would not even permit that testimony. RP 134-135. This was error. Ms. Kappelman was entitled to introduce this evidence, and in any event, Mr. Lutz's attorney 'opened the door' by asking about Ms. Kappelman's statement. Nania v. Pacific N.W. Bell Tel. Co., 60 Wn. App. 706, 709-10, 806 P.2d 787 (Div. 3 1991) (invited error). Ms. Kappelman's attorney was entitled to flesh out the broader circumstance of the statement and Mr. Lutz's attorney opened the door to this questioning. State v. Korum, __ Wn. __, 2006 Wn. Lexis 614 at p. 49, 141 P.3d 13 (2006) (defense counsel opened the door to prosecutor asking otherwise inadmissible questions).

> "An insured which has in its possession impeaching statements of a witness, which statements were secured by one of its

> representatives, may use such statements or not for impeaching purposes as it elects; but if it decides to use them, the other side has an absolute right to bring out who took the statements and his interest in the matter. The courts are not required to pussyfoot around at that stage to avoid embarrassment to the insurer."(footnote omitted). 21B Appleman, Insurance Law and Practice, § 12835.

Research discloses no Washington case 'on all fours,' but basic Washington legal rules support this result. Under ER 411 (APP-3, p. 5), evidence of insurance is admissible for reasons other than to show liability, including to show bias. See, C.S. Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910) (evidence of insurance admissible to show control). It was perfectly appropriate for Ms. Kappelman to show that the person eliciting her statement was an insurance adjuster (whose bias was to further the insurer's interest by eliciting a favorable statement from her). In Lander v. Shannon, 148 Wash. 93, 268 P. 145 (1928), an attorney of record for the defense testified to statements the victim made to him while she was ill in the hospital. On cross-examination, it was proper to show "the interest and affect the credibility of the witness" by eliciting evidence that the attorney represented an insurance company. Lander v. Shannon, 148 Wash.. 93, 101, 268 P. 145 (1928). And,

Washington adheres to the rule of 'invited error/opening the door.' State v. Korum; Nania v. Pacific N.W. Bell Tel. Co., supra. Under this rule, the evidence was admissible.

Nationwide, the most instructive case is Heisler v. Boule, 226 Mont. 332, 338-39, 735 P.2d 516 (1987). This was an automobile accident case. One of the drivers later died from unrelated causes, and his estate was a defendant. The decedent made a tape-recorded statement to an insurance company's representative.[4] The trial court admitted the tape, edited to exclude references to insurance. On appeal, the basic ruling was that the tape was hearsay and not within any exception. The court also rejected the suggestion that the taped statement was cumulative and not prejudicial:

> "We find that admission of Boule's tape recorded statement was clearly prejudicial, and not merely harmless cumulative evidence. The taped statement was introduced to the jury as evidence without explanation about the circumstances under which it was taken. The jury did not know that the statement was given by Boule to his insurance company's claim representative. The jury was not exposed to any foundational information reflecting biases or prejudices on the part of the adjustor in asking the question or Boule in answering them. The tape was introduced without information that the jury needed to put Boule's statement in proper perspective."

Heisler v. Boule, 226 Mont. 332, 338, 735 P.2d 516 (1987).

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[4] Plaintiff and defendant had the same carrier.

The denial of the opportunity to explain the circumstances of the statement, including information reflecting biases or prejudices of the adjuster soliciting the statement, was an abuse of discretion. Ms. Kappelman was absolutely entitled to bring in this evidence. Mr. Lutz chose to bring in the statement. Once he did, Ms. Kappelman should have been allowed to identify the person soliciting the statement as an insurance adjuster representing Mr. Lutz's carrier. As Judge Learned Hand wrote:

> "If he was in the employ of someone who stood to pay the judgment, it would certainly be unjust to suppress that connection; it makes no difference that this let in the fact that the real defendant was an insurance company."

Mideastern Contracting Corp. v. O'Toole, 55 F.2d 909, 912 (2d Cir. 1932). The error was prejudicial because, left unexplained, it was in effect a statement that Mr. Lutz was not negligent.

4. The Trial Court Erred In Excluding Evidence Of the Acceleration Capability Of Mr. Lutz's Motorcycle

(a) Standard of Review

The standard is 'abuse of discretion'. "[A]dmission of evidence lies largely within the sound discretion of the trial court." Goodwin v. Bacon, 127 Wn.2d 50, 54, 896 P.2d 673, 676 (1995), quoting, Davis v. Globe Mach. Mfg.

Co., 102 Wn.2d 68, 76, 684 P.2d 692 (1984). That discretion is abused where the "exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." Goodwin v. Bacon, 127 Wn.2d at 54, quoting, Davis v. Globe Mach. Mfg. Co., 102 Wn.2d at 77. Ms. Kappelman claims the trial court was manifestly unreasonable in excluding evidence of the motorcycle's acceleration capabilities. A court's exercise of discretion is "'manifestly unreasonable'" if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-424, 138 P.3d 1053 (2006). An erroneous ruling on evidence is grounds for reversal if it results in prejudice. An evidentiary error is considered prejudicial if, within reasonable probability, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstein, 122 Wn2d 109, 125-26, 857 P.2d 270 (1993).

(b) Argument

The subject accident occurred about one-third mile north of the city limits of Husum. RP 231. Mr. Lutz testified he was traveling at 45 mph until he left Husum city limits. One-third of a mile later, Ms. Kappelman's expert testified that Mr. Lutz was conservatively traveling at 80-85 mph before

gearing down to 70-77 mph, after decelerating and gearing down twice after he first saw the deer. Ms. Kappelman testified Mr. Lutz accelerated to 80-90 mph as soon as he left Husum city limits, and she felt like she was being "sucked off" the back of the motorcycle.

Mr. Lutz moved to exclude evidence of the characteristics of the motorcycle on the grounds that it was irrelevant. RP 49-50. The trial court allowed Ms. Kappelman to introduce evidence of the motorcycle's top speed, but not of its ability to accelerate rapidly. RP 50-52.

The excluded testimony was **highly** relevant to resolving the conflict in testimony between Mr. Lutz, on the one hand, and Ms. Kappelman and Mr. Stearns, on the other. Mr. Lutz claimed he was only going 45 mph in Husum and 65 mph a short distance later when he first saw the deer. Ms. Kappelman testified he then was traveling as much as 90 mph, and Mr. Stearns that he was going as much as 80-85 mph when he first started braking. The performance characteristics of motorcycles, much less high-stroke 600 cc motorcycles, is not common knowledge. Without the offered testimony, the jury easily could have believed it impossible or improbable that Mr. Lutz could have accelerated to 90 mph in such a short distance. This could cause the jury to discredit this part of Ms. Kappelman's testimony and to distrust her testimony

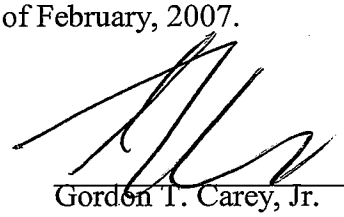
generally. This effect on the credibility of this testimony and on her entire testimony was highly prejudicial to her case.

This ruling was prejudicial. The jury could simply have disbelieved that Mr. Lutz could have accelerated to 90 mph, and therefore could have accepted Mr. Lutz's testimony.

E. CONCLUSION

This court should vacate the jury verdict and judgment below, reverse the trial court's evidentiary and jury instruction rulings referenced in Error Assignments 1 – 4, and remand the case for a new trial

Dated this 2nd day of February, 2007.



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APPENDIX

APPENDIX 3

In accordance with RAP 10.4 (c) appellant sets forth the following:

§ 46.04.200. Hours of darkness

"Hours of darkness" means the hours from one-half hour after sunset to one-half hour before sunrise, and any other time when persons or objects may not be clearly discernible at a distance of five hundred feet.

§ 46.20.500. Special endorsement -- Exceptions.

(1) No person may drive either a two-wheeled or a three-wheeled motorcycle, or a motor-driven cycle unless such person has a valid driver's license specially endorsed by the director to enable the holder to drive such vehicles.

(2) However, a person sixteen years of age or older, holding a valid driver's license of any class issued by the state of the person's residence, may operate a moped without taking any special examination for the operation of a moped.

(3) No driver's license is required for operation of an electric-assisted bicycle if the operator is at least sixteen years of age. Persons under sixteen years of age may not operate an electric-assisted bicycle.

(4) No driver's license is required to operate an electric personal assistive mobility device or a power wheelchair.

(5) No driver's license is required to operate a motorized foot scooter. Motorized foot scooters may not be operated at any time from a half hour after sunset to a half hour before sunrise without reflectors of a type approved by the state patrol.

§ 46.20.510. Instruction permit -- Fee

(1) Motorcycle instruction permit. A person holding a valid driver's license who wishes to learn to ride a motorcycle may apply for a motorcycle instruction permit. The department may issue a motorcycle instruction permit after the applicant has successfully passed all parts of the motorcycle examination other than the driving test. The director shall collect a fee of fifteen dollars for the motorcycle instruction permit or renewal, and deposit the fee in the motorcycle safety education account of the highway safety fund.

(2) Effect of motorcycle instruction permit. A person holding a motorcycle instruction permit may drive a motorcycle upon the public highways if the person has immediate possession of the permit and a valid driver's license. An individual with a motorcyclist's instruction permit may not carry passengers and may not operate a motorcycle during the hours of darkness.

(3) Term of motorcycle instruction permit. A motorcycle instruction permit is valid for ninety days from the date of issue.

(a) The department may issue one additional ninety-day permit.

(b) The department may issue a third motorcycle instruction permit if it finds after an investigation that the permittee is diligently seeking to improve driving proficiency.

§ 46.20.515. Examination -- Emphasis -- Waiver

The motorcycle endorsement examination must emphasize maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision. The examination for a two-wheeled motorcycle endorsement and the examination for a three-wheeled motorcycle endorsement must be separate and distinct examinations emphasizing the skills and maneuvers necessary to operate each type of motorcycle. The department may waive all or part of the examination for persons who satisfactorily complete the voluntary motorcycle operator training and education program authorized under RCW 46.20.520 or who satisfactorily complete a private motorcycle

skills education course that has been certified by the department under RCW 46.81A.020.

§ 46.20.520. Training and education program -- Advisory board

(1) The director of licensing shall use moneys designated for the motorcycle safety education account of the highway safety fund to implement by July 1, 1983, a voluntary motorcycle operator training and education program. The director may contract with public and private entities to implement this program.

(2) There is created a motorcycle safety education advisory board to assist the director of licensing in the development of a motorcycle operator training education program. The board shall monitor this program following implementation and report to the director of licensing as necessary with recommendations including, but not limited to, administration, application, and substance of the motorcycle operator training and education program.

The board shall consist of five members appointed by the director of licensing. Three members of the board, one of whom shall be appointed chairperson, shall be active motorcycle riders or members of nonprofit motorcycle organizations which actively support and promote motorcycle safety education. One member shall be a currently employed Washington state patrol motorcycle officer with at least five years experience and at least one year cumulative experience as a motorcycle officer. One member shall be a member of the public. The term of appointment shall be two years. The board shall meet at the call of the director, but not less than two times annually and not less than five times during its term of appointment, and shall receive no compensation for services but shall be reimbursed for travel expenses while engaged in business of the board in accordance with RCW 43.03.050 and 43.03.060 as now existing or hereafter amended.

(3) The priorities of the program shall be in the following order of priority:

(a) Public awareness of motorcycle safety.

(b) Motorcycle safety education programs conducted by public and private entities.

(c) Classroom and on-cycle training.

(d) Improved motorcycle operator testing..

§ 46.81A.001. Purpose

It is the purpose of this chapter to provide the motorcycle riders of the state with an affordable motorcycle skills education program in order to promote motorcycle safety awareness.

§ 46.81A.020. Powers and duties of director, department

(1) The director shall administer and enforce the law pertaining to the motorcycle skills education program as set forth in this chapter.

(2) The director may adopt and enforce reasonable rules that are consistent with this chapter.

(3) The director shall revise the Washington motorcycle safety program to:

(a) Institute separate novice and advanced motorcycle skills education courses for both two-wheeled and three-wheeled motorcycles that are each a minimum of eight hours and no more than sixteen hours at a cost of (i) no more than fifty dollars for Washington state residents under the age of eighteen, and (ii) no more than one hundred dollars for Washington state residents who are eighteen years of age or older and military personnel of any age stationed in Washington state;

(b) Encourage the use of loaned or used motorcycles for use in the motorcycle skills education course if the instructor approves them;

(c) Require all instructors for two-wheeled motorcycles to conduct at least three classes in a one-year period, and all instructors for three-wheeled motorcycles to conduct at least one class in a one-year period, to maintain their teaching eligibility;

(d) Encourage the use of radio or intercom equipped helmets when, in the opinion of the instructor, radio or intercom equipped helmets improve the quality of instruction.

(4) The department may enter into agreements to review and certify that a private motorcycle skills education course meets educational standards equivalent to those required of courses conducted under the motorcycle skills education program. An agreement entered into under this subsection must provide that the department may conduct periodic audits to ensure that educational standards continue to meet those required for courses conducted under the motorcycle skills education program, and that the costs of the review, certification, and audit process will be borne by the party seeking certification.

(5) The department shall obtain and compile information from applicants for a motorcycle endorsement regarding whether they have completed a state approved or certified motorcycle skills education course.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 2, 2007, I filed the original and one (1) copy of the foregoing **AMENDED OPENING BRIEF**, by sending them via Federal Express, enclosed in a sealed envelope and addressed to:

Administrator Division III
Washington State Court of Appeals
500 North Cedar Street
Spokane, Washington 99201

I further certify that on February 2, 2007, I served one (1) copy of the foregoing **AMENDED OPENING BRIEF**, by sending it via regular mail, enclosed in a sealed envelope and addressed to:

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